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In the Supreme Court of the United States

OCTOBER TERM, 1979

ALLAN HOLLOWAY and ALLEN E. PERKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

STANLEY SPIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (79-1184 Pet. App. 1a-24a) is reported at 604 F.2d 961.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1979. A petition for rehearing was denied on January 2, 1980 (Pet. App. 25a). The petition for a writ of certiorari in No. 79-1184 was filed on January 31, 1980, and the petition in No. 79-1194 was filed on February 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a written stipulation signed by all counsel and accepted by the district court validly waived petitioners' right to a 12-member jury under Fed. R. Crim. P. 23(b).

2. Whether the instructions to the jury on intent violated petitioners' due process rights.

3. Whether the district court lacked jurisdiction to enter a judgment of conviction and sentence petitioners, after the court granted a motion for a new trial and then vacated the new trial order in response to the government's timely motion for reconsideration.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix in No. 79-1184.

4. Whether the district court abused its discretion in substituting alternates for two jurors who were found to be acquainted with one of the defendants.

5. Whether the district court's deletion of the words "aiding and abetting" from the substantive mail fraud counts was an impermissible amendment of the indictment.

STATEMENT

After a nine-week jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Spiegel was convicted on 30 counts and was sentenced to six and one-half years' imprisonment, followed by five years' probation. Petitioner Holloway was convicted on 25 counts and was sentenced to five years' imprisonment, followed by five years' probation. Petitioner Perkins was convicted on one count and was sentenced to one year's imprisonment.[2] The court of appeals affirmed (Pet. App. 1a-24a).

1. Petitioners do not challenge the sufficiency of the evidence to support their convictions. Accordingly, we rely primarily on the summary of the 50-volume trial record in the opinion of the court of

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[2] All three petitioners were indicted, along with three other defendants, on 32 counts of mail fraud and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. One defendant pleaded guilty to one count of mail fraud, and the other five proceeded to trial. Petitioners were acquitted on the conspiracy charge, and the two co-defendants were acquitted on all charges.

appeals (Pet. App. 2a-5a). Briefly, the government's evidence established that in October 1970 petitioner Spiegel acquired a controlling interest in a New York-based corporation, Coliseum Properties, Inc. (Coliseum). He then formed two subsidiaries of Coliseum, Leasing Corporation of America (Leasing) and Auditing Services, Inc. (Auditing), both with offices in Atlanta. Petitioner Holloway's firm, Holloway Enterprises, Inc. (HEI), contracted with Coliseum to sell franchises for both Auditing and Leasing (Pet. App. 3a).

The criminal activity involved the fraudulent sale of franchises to numerous purchasers throughout the United States. Leasing offered franchises to persons interested in entering the leasing business. Prospective dealers were told that they could offer to lease any income-producing equipment to businesses and industries in their territory. They were told that Leasing had a distinct competitive advantage because of its access to more than 200 sources of funding and that therefore Leasing dealers could offer more favorable lease terms than other leasing companies. A number of other promises were made as part of the sales pitch, and the names and telephone numbers of allegedly successful dealers were furnished to prospects. A total of 34 Leasing franchises were sold between December 1970 and December 1971, at $10,000 each. Of 137 lease applications submitted by dealers in 1971, only four leases were placed (Pet. App. 3a).

Auditing offered to conduct computerized audits of utility expenses incurred by businesses and industries. Under petitioners' scheme, Auditing dealers would solicit business customers whose past utility bills would then be audited for overcharges, computation errors, or other incorrect billing procedures. On the basis of such audits, prospective dealers were told, customers could expect to recover refunds for past inaccurate billings; in addition, Auditing would make recommendations for changes in service that would enable clients to save on future utility bills. Customers were to pay their Auditing dealer 50% of any refunds or savings realized as a result of the computerized audits and service recommendations; the dealer would then submit half his profits to Auditing. Prospective dealers were told that Auditing's computerized analyses would assure recoveries for a very high percentage of the customer accounts audited. It was claimed that the utility rates from each dealer's territory were programmed into Auditing's computer. Prospects were shown photographs of an RCA computer and were given the names and addresses of purportedly successful dealers. Sixty-two Auditing franchises were sold in 1971. Auditing's share of the franchise fees was more than $650,000, and HEI received more than $225,000. Although franchisees submitted numerous auditing contracts, very few recoveries ever occurred (Pet. App. 3a-4a).

Evidence showed that many of the representations made to franchise purchasers were false. Leasing

did not have the funding sources it claimed; letters from alleged sources were shown to have been falsified. Auditing never had the capacity to audit utility bills by computer; it used only about seven hours of computer time during a 10-week contract with a facility in Alabama. Moreover, petitioner Spiegel had been told by a computer expert that the rate structure of an entire utility company could not be programmed, and that billing analyses had to proceed one business at a time (Pet. App. 4a).

Petitioners Spiegel and Holloway were shown to have been directly involved in the fraudulent sales. Petitioner Perkins worked as a "singer" for both Leasing and Auditing, posing as a successful dealer and falsely claiming that he was receiving significant income from his "franchises" (Pet. App. 4a).

2. At a pretrial conference attended by all counsel and by petitioner Spiegel, the court raised the question whether all parties would waive their right to a jury of 12 (4 Tr. 50). No decision was reached at that time, and the court raised the matter again a week later, after voir dire and before the actual selection of jurors. In a side-bar conference, each defense attorney stated that his client would waive the requirement of 12 jurors (6 Tr. 120).[3] It was also agreed that two alternate jurors would be selected, notwithstanding the waiver (6 Tr. 122, 125).

[3] The transcript of the side-bar discussion indicates that defense counsel agreed to waive the requirement of 12 jurors in exchange for five additional preemptory challenges (6 Tr. 120, 122).

After selection of the jury, counsel for the government and for all the defendants signed a written stipulation waiving the requirement of 12 jurors (No. 79-1194 Pet. App. F-1), and the trial judge announced in open court that he had received and approved the written "agreement to proceed with less than twelve [jurors] in the event of necessity" (6 Tr. 133).

Soon after the trial began, two jurors were excused and were replaced by the two alternates (9 Tr. 20, 37). Near the end of the lengthy trial one of the remaining jurors became ill. When the juror did not report for duty on Monday of the trial's ninth week, all defense counsel asked, in the presence of their clients, that the juror be discharged and that the trial proceed with 11 jurors (44 Tr. 3). Over the government's objection, the district court excused the juror and explained to the jury, in the defendants' presence, that the trial would proceed with 11 jurors (44 Tr. 3-4, 9).

ARGUMENT

1. Petitioners contend (79-1194 Pet. 21-27) that their convictions should be reversed because they personally did not expressly consent on the record to a verdict by an 11-member jury.[4] Petitioners argue that the waiver in this case was made by counsel alone and that such a waiver cannot satisfy the requirements of the Sixth Amendment or Rule 23(b) of the Federal Rules of Criminal Procedure.

[4] Petitioners Holloway and Perkins have adopted the arguments raised by petitioner Spiegel (79-1184 Pet. 4).

Petitioners' argument begins with *Patton* v. *United States*, 281 U.S. 276 (1930), in which the question presented was whether a defendant can ever "waive [his] constitutional right to a trial by a jury of twelve persons." *Id.* at 287. This Court held that such a waiver is permissible (*id.* at 297, 305-308). The Court further stated in dictum that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Id.* at 312. Several years after *Patton*, the permissibility of a waiver of the right to a 12-member jury was codified in Fed. R. Crim. P. 23(b), which provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Petitioners assert (79-1194 Pet. 22-23) that *Patton* required "the express and intelligent consent of the defendant" for a waiver of a jury of 12 and that that requirement has not been modified by subsequent developments. This contention is incorrect for two reasons. In the first place, the question of how a defendant's waiver must be manifested in order to be effective was not controverted in *Patton*. The Court's summary of the facts of the case (281 U.S. at 286-

287) leaves no doubt that the defendants, after consulting with counsel, personally agreed to continue the trial before the 11 jurors who remained after one was excused for illness. The Court's subsequent reference to the "express and intelligent consent of the defendant" as a prerequisite for an effective waiver was thus unnecessary to the decision, since there was no dispute that the defendants in *Patton* fulfilled all possible requirements on that score. Moreover, *Patton* was decided on the assumption that the Sixth Amendment right to a jury trial in criminal cases entailed a jury of 12. That assumption proved erroneous in *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970), in which the Court held that a 12-member panel is not a necessary ingredient of the trial by jury guaranteed by the Sixth Amendment.

Accordingly, since the decision in *Williams*, a defendant's right to a 12-person jury has only a statutory basis. In the federal system, that basis is Fed. R. Crim. P. 23(b). *United States* v. *Roby*, 592 F.2d 406, 408 (8th Cir.), cert. denied, 442 U.S. 944 (1979). *Patton's* reference to the "express and intelligent consent of the defendant" was not only unnecessary to the Court's decision but also a product of what we now know to be an ill-founded assumption that waiver of a 12-person jury relinquishes a constitutional right and therefore must meet a high standard of voluntariness. Since *Williams* v. *Florida*, *supra*, the propriety of a waiver of a 12-person jury in a federal criminal trial turns solely on the interpreta-

tion and application of Rule 23(b). No constitutional issue is involved.

Petitioners allege a conflict among the circuits as to the type of consent required by Rule 23(b) in order to effect a valid waiver (79-1194 Pet. 24-27). They assert that several courts of appeals have construed the words "parties may stipulate in writing" to mean that the Rule requires the express consent of the defendant himself in open court, regardless of any written or oral stipulation by defense counsel, while other courts have held that an agreement by counsel is enough to bind the defendant. In fact, however, whatever disagreement has developed among the courts of appeals regarding the interpretation of Rule 23(b) is not implicated in this case.

All the cases in which the courts have required the defendant's personal and express consent to a jury of less than 12 involved the lack of a written stipulation and therefore an apparent violation of the terms of Rule 23(b). The courts' inquiry in these cases focused on whether the purpose of the Rule might nevertheless be fulfilled, even in the absence of literal compliance with its terms. *United States* v. *Reyes*, 603 F.2d 69, 70, 71 (9th Cir. 1979); *United States* v. *Smith*, 523 F.2d 788, 791 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976) (written stipulation lost); *United States* v. *Taylor*, 498 F.2d 390, 391-392 (6th Cir. 1973); *United States* v. *Lane*, 479 F.2d 1134 (6th Cir.), cert. denied, 414 U.S. 861 (1973); *United States* v. *Ricks*, 475 F.2d 1326, 1327-

1328 (D.C. Cir. 1973); *United States* v. *Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971).[5]

The courts of appeals have uniformly held that, despite the language of the Rule, the stipulation need not be in writing to be effective, and that it is sufficient if the record adequately shows the defendant's consent to the agreement. *E.g.*, *United States* v. *Smith*, *supra*, 523 F.2d at 791; *United States* v. *Lane*, *supra*, 479 F.2d at 1136; *United States* v. *Ricks*, *supra*, 475 F.2d at 1328; *United States* v. *Guerrero-Peralta*, *supra*, 446 F.2d at 877; *Horne* v. *United States*, 264 F.2d 40, 43 (5th Cir.),

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[5] *United States* v. *Vega*, 447 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972), another case cited by petitioners (79-1194 Pet. App. I-1) as requiring the defendant's personal consent, did not actually state such a rule. Without discussing either the absence of a written stipulation or the specific kind of consent that must appear, the court found that Rule 23(b) was satisfied where counsel was shown to have consulted with his client before orally agreeing to proceed with 11 jurors. Similarly, *Fowler* v. *Hunter*, 164 F.2d 668 (10th Cir. 1947), held only that a stipulation by counsel, when agreed to by the defendant, is a valid waiver.

In *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964), the court of appeals ruled that the district court erred in allowing *more* than 12 jurors to participate in deliberations; the court assumed in dictum (*id.* at 871) that a written stipulation by the parties in conformity with Rule 23(b) would be sufficient to effect a valid waiver of a jury of 12. And, in *United States* v. *Taylor*, 507 F.2d 166, 168 (5th Cir. 1975), the court of appeals simply did not address the question of how a defendant's consent to a jury of fewer than 12 must be manifested. In *Taylor*, there was no waiver at all, written or oral, by either counsel or the defendant himself; indeed, defense counsel vigorously objected when the district court decided to accept the verdict of 11 jurors.

cert. denied, 360 U.S. 934 (1959); see also *Williams* v. *United States*, 332 F.2d 36, 39 (7th Cir. 1964), cert. denied, 379 U.S. 976 (1965). The courts have reasoned that the purpose of the written stipulation requirement is to ensure that the defendant in fact consented to a trial and verdict by less than 12 jurors and that this purpose is satisfied whenever the record adequately demonstrates his consent. *E.g.*, *United States* v. *Guerrero-Peralta*, *supra*, 446 F.2d at 877.

The disagreement that has arisen under Rule 23 (b) concerns the kind of showing in the record that is sufficient to demonstrate the defendant's consent when there is no written stipulation. In those circumstances, some courts have held that the explicit consent of the defendant must appear in the record (*e.g.*, *United States* v. *Taylor*, *supra*; *United States* v. *Guerrero-Peralta*, *supra*), and others have accepted some indication of implied consent (*United States* v. *Roby*, *supra*, 592 F.2d at 408; *Williams* v. *United States*, *supra*; *Horne* v. *United States*, *supra*).

Here, however, a written stipulation was executed by counsel for all parties and accepted by the district court. Rule 23(b) was fully satisfied, and there is no need to inquire further into the quality of the defendants' consent. The formality of a written stipulation provides the best evidence of a defendant's consent. That is why Rule 23 provides in terms for waiver by written stipulation. The Rule does not require the defendant's own signature on

the stipulation. Indeed, the wording of subsection (b)—"the parties may stipulate"—contrasts with that of subdivision (a) of the same Rule, which provides that "the defendant" must waive in writing his right to a trial by jury.

In the only other case involving the question whether the defendant himself must sign the Rule 23(b) stipulation, *United States* v. *Pacente*, 503 F.2d 543 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974), the court held that counsel's signature was enough to satisfy the Rule, without any other showing of the defendant's express consent. As the court of appeals stated in *Pacente* (*id.* at 552):

> Nothing in Rule 23(b) suggests that counsel's signature on a stipulation for a reduced size of jury does not bind the party he represents if the record fails to show that the party authorized counsel to stipulate.

While the record in this case fails to show the express personal consent of petitioners to the waiver agreed to by counsel, there is ample indication that petitioners were aware of and consented to their lawyer's action. The matter of the waiver was discussed in the presence of all defendants, acceptance by the trial judge of the written stipulation was announced in open court, and, at the time of the twelfth juror's dismissal, it was explained, again in open court and without objection from any defendant, that the trial would proceed with 11 jurors.

Moreover, as the court of appeals noted (Pet. App. 11a), defense counsel in this case affirmatively

sought, as a matter of trial strategy, the dismissal of the twelfth juror and pressed this course over the prosecution's objection. Petitioners cannot now maintain that their rights were not fully protected. See *United States* v. *Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), cert. denied, 425 U.S. 938 (1976). In the circumstances of this case, both the literal terms of Rule 23(b) and its underlying purpose were fulfilled.

2. Petitioners also challenge the constitutionality of the district court's instructions to the jury on the question of intent (79-1194 Pet. 9-21). The court's charge included the following statement (47 Tr. 45; emphasis added):

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence*, you, the jury, may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.[6]

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[6] In addition to challenging the statement reproduced in the text, petitioners also assert that two additional portions of the court's instructions were erroneous. These portions of the charge (reprinted at 79-1194 Pet. 12) both concerned the presumption that every person knows what the law is, and they were both correct statements of the law. E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 14.10 (3d ed. 1977).

Several courts of appeals, including the Fifth Circuit, have disapproved this so-called "Mann" charge (see *Mann* v. *United States*, 319 F.2d 404, 407 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964)), although they have generally found that other parts of the instructions to the jury cured the problem in individual cases. The courts have objected to the charge on the grounds that it may be interpreted by a jury to shift the burden of proof on criminal intent to the defendant. See, *e.g.*, *United States* v. *Garrett*, 574 F.2d 778 (3d Cir. 1978); *United States* v. *Chiantese*, 560 F.2d 1244 (5th Cir. 1977) (en banc); *United States* v. *Robinson*, 545 F.2d 301 (2d Cir. 1976); *United States* v. *Diggs*, 527 F.2d 509 (8th Cir. 1975); *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967); *United States* v. *Releford*, 352 F.2d 36 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966). In its *en banc* ruling in *United States* v. *Chiantese*, *supra*, the Fifth Circuit held that, although the error of giving such an instruction would not automatically produce a reversal, it could not be cured in future cases by reference to correct statements elsewhere in the charge regarding the government's burden of proof. 560 F.2d at 1255. As the court of appeals panel in the present case noted (Pet. App. 19a, 21a), however, the *Chiantese* ruling was prospective only. Adhering to the procedure followed in *Chiantese* itself (see 582 F.2d 974 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979)), therefore, the panel reviewed the district court's instructions in their entirety. The

court ruled that, taken as a whole, the instructions were not misleading and that "the evidence of objective conduct [was] sufficient to sustain a guilty verdict despite the *Mann* language" (Pet. App. 21a, 22a).

Relying on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioners contend that their convictions cannot stand in the face of the improper instruction on intent. The instruction given in this case, however, was materially different from that condemned in *Sandstrom*. The charge in *Sandstrom* informed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." By contrast, the disputed instruction in this case was phrased in terms of a permissible inference. Notwithstanding petitioners' contention to the contrary, this difference in language is significant. The Court in *Sandstrom* stressed the particular danger of the "presumption" language used by the state trial court. The critical factor, in the Court's view, was that the jurors "were not told that they had a choice, or that they might infer that [a person intends the ordinary consequences of his voluntary acts]; they were told only that the law presumed it." 442 U.S. at 515. Moreover, the jurors in *Sandstrom* "were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." *Id.* at 517. The Court concluded (*id.* at 517, 519; citation omitted): "Given the common definition of 'presume' as

'to suppose to be true without proof,' and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury * * * could have given the presumption conclusive or persuasion-shifting effect * * *."

Thus, although the courts of appeals have also disapproved the use of an "inference unless contrary evidence" charge, it is only the "presumption" instruction that this Court has found so likely to mislead a jury that it violates the constitutional due process guarantee. The particular charge given here was not at issue in *Sandstrom* and was not discussed. Moreover, the defendant in *Sandstrom* presented a clear contemporaneous objection to the "presumption" instruction (442 U.S. at 513); by contrast, petitioners did not complain about the *Mann* charge at trial (Pet. App. 20a & n.16). They made only a vague general objection to "putting the burden on the defendant," and they did not identify specifically any allegedly erroneous portion of the instruction. Their objection on appeal therefore must be evaluated under the "plain error" standard of Fed. R. Crim. P. 52(a). See also Fed. R. Crim P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection"). In these circumstances, the court of appeals correctly held that *Sandstrom* "does not mandate a finding [of] * * * constitutional

deficiencies" in all potentially burden-shifting charges (Pet. App. 17a).

In addition, the *Sandstrom* decision is partially explained by the lack of any specific qualifying or curative instructions that would have ameliorated the effect of the trial judge's use of the "presumption" instruction. *Sandstrom* did not hold, as petitioners assert (79-1194 Pet. 14), that other portions of the charge cannot cure an erroneous instruction like the one given in that case. The Court's opinion said only that the very general additional instructions given there were not sufficient to remove the risk that the jury would regard the "presumption" instruction as either conclusive or "persuasion-shifting" (442 U.S. at 518 n.7).

Here, by contrast, the district court devoted a lengthy portion of its instructions to the issue of intent, emphasizing the jury's responsibility with regard to this aspect of the case. The jury was told repeatedly that the burden was always on the prosecution to prove each element beyond a reasonable doubt and that the defendant never had any "burden or duty of calling any witnesses or producing any evidence" (47 Tr. 15, 29, 34). The court explained that "[f]raudulent intent is not presumed or assumed" (47 Tr. 31), that "[s]pecific intent means more than the general intent to commit a crime or commit an act" (47 Tr. 42), that intent could be proved by circumstantial evidence, and that the jury could consider "any statements made or omitted or acts done or omitted by the defendent" as well as all

the surrounding facts and circumstances that might aid in their determination of his state of mind (47 Tr. 32, 42, 46-47). The objectionable phrase in the court's instructions was but one small part of a complete and careful exposition of how the jury should proceed in determining whether intent had been proved.

Considered as a whole (see *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the instructions clearly and adequately conveyed the nature of the government's burden of proof. The possibility that the jury was misled is negligible. Furthermore, in light of the en banc court of appeals' decision in *Chiantese*, it is unlikely that the instruction of which petitioners complain will be repeated in the Fifth Circuit, which has produced the bulk of litigation concerning the *Mann* charge.[7] At the very least, intervention by this

[7] Petitioners allege (79-1194 Pet. 17-18) that the Fifth Circuit decision in *Hammontree* v. *Phelps*, 605 F.2d 1371 (1979), conflicts with the court of appeals' ruling here. An intra-circuit conflict ordinarily does not constitute grounds for review in this Court (*Wisniewski* v. *United States*, 353 U.S. 901 (1957)), and, in any event, the cases are distinguishable. *Hammontree* involved a statutory presumption that was meant to be permissive only but that was found to have been erroneously interpreted as mandatory in the state trial court's instructions to the jury. In addition, the instructions as a whole were confusing in their juxtaposition of the notions of presumptive evidence against the defendant and the presumption of innocence. The trial court did not make clear that the defendant had no duty to present evidence in his favor and, in fact, the instruction may well have left the impression that the defendant was required to rebut the presumption against him. See 605 F.2d at 1379-1380.

Court is not warranted until it can be seen whether *Chiantese* is successful in producing its intended result of eliminating the *Mann* charge in the Fifth Circuit.

3. Petitioners contend that their due process and speedy trial rights were violated when the district court, before sentencing and judgment of conviction, granted and then denied a motion for a new trial (79-1194 Pet. 28-35).

Petitioners filed motions for a new trial shortly after the jury's verdicts were announced in August 1974. The district court permitted petitioners to delay the filing of amplified motions until a copy of the lengthy transcript could be obtained from the court reporter. Amended motions were finally filed in June 1976. On April 14, 1977, the district court granted a new trial. The court's order (Pet. App. 26a) stated:

> Defendants' motion for new trial is granted by reason only of the grounds relating to final decision by eleven jurors only. While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *United States* v. *Williams*, 523 F.2d 1203 (1975).

The court later revealed that, at the time it ordered a new trial, it had already discovered the panel's initial decision in *Chiantese* (546 F.2d 135 (5th Cir.

1977)), and it was concerned that its use of the *Mann* charge, "considered in conjunction with the 12-juror issue," might cause reversal (Pet. App. 29a). The government moved for reconsideration of the district court's new trial order and informed the court that the Fifth Circuit had decided to hear *Chiantese* en banc.

On June 8, 1977, the district court granted the motion for reconsideration and vacated its new trial order (79-1194 Pet. App. B-1). Several months later, after the en banc decision in *Chiantese*, the district court denied the motions for a new trial, stating that it was "persuaded that decision by an eleven man jury was not error, and that a 12-man jury was properly waived" (Pet. App. 29a). Petitioners were finally sentenced, and the judgment of conviction was entered, in February 1978. Petitioners appealed, and petitioner Spiegel also sought a writ of mandamus directing the district court to reinstate its new trial order and vacate his sentence. Spiegel argued that the district court lacked power to reconsider the new trial order, because that order rendered the jury verdict null and void and deprived the district court of jurisdiction to reinstate the verdict and impose sentence. The court of appeals denied mandamus (No. 78-1764, June 6, 1978), and this Court denied certiorari (439 U.S. 861 (1978)). Petitioners now repeat the same arguments advanced earlier by Spiegel in support of his request for mandamus. Although now advanced on direct review of petitioners' convictions, the arguments are no more persuasive

than before, and they do not merit further attention from this Court.

If the district court had entered a judgment of acquittal following the jury's verdict of guilty, the government could have appealed, and in the event of a reversal by the court of appeals, the jury verdict would have been reinstated. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977); *United States* v. *Wilson*, 420 U.S. 332, 344-345 (1975); *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975). If entry of a judgment of acquittal does not render a jury verdict null and void, it follows *a fortiori* that an interlocutory order for a new trial, granted before any judgment of conviction was entered, should not invalidate the jury verdict.

Petitioners rely on language in *United States* v. *Spinella*, 506 F.2d 426, 430 (5th Cir. 1975), but that case does not support their argument. The court in *Spinella* held only that, once a trial has begun and jeopardy has attached, the district court does not have the power to vacate its new trial order and reinstate the original conviction. The court stated that the order granting a new trial operated to vacate the previous judgment of conviction; it did not say that the jury's verdict was rendered a nullity or that a court that has granted a new trial may not change its mind in response to a timely motion for reconsideration and enter a judgment of conviction on the outstanding verdict. In fact, the court in *Spinella* implied that a new trial order in a criminal case can be vacated at any time before the new

trial begins, just as may be done in a civil case (*ibid.*). At least where a timely request for reconsideration has been filed, this is a salutary rule, because it gives district courts an opportunity to correct their own errors and to avoid unnecessary expenditures of judicial resources. Cf. *United States* v. *Dieter*, 429 U.S. 6, 8 (1976); *United States* v. *Healy*, 376 U.S. 75, 80 (1964).[8]

4. Petitioners Holloway and Perkins raise two insubstantial claims not joined by petitioner Spiegel. They argue first (79-1184 Pet. 4-8) that the district court erred when it removed two jurors during the course of the trial and replaced them with alternates.

During voir dire, counsel for the government did not inquire whether anyone knew the defendants or their families. On the day after the jury was sworn, one of the jurors, Helen McSwain, informed a clerk that she was acquainted with petitioner Spiegel (7 Tr. 4). The trial judge informed counsel, and the trial proceeded without objection (7 Tr. 5). The next

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[8] Petitioners make much (79-1194 Pet. 34 n.7) of the government's failure timely to file its brief in support of its motion for reconsideration. But, as the court of appeals correctly noted (Pet. App. 24a), application of a court's local rules is a discretionary matter; the district court's failure to insist on full compliance with a rule does not deprive it of jurisdiction. *Schacht* v. *United States*, 398 U.S. 58, 64 (1970).

As to petitioners' speedy trial claim (79-1194 Pet. 34), the court of appeals correctly held that the Speedy Trial Act, 18 U.S.C. 3161(e), was tolled by the granting of the government's motion for reconsideration before the expiration of 60 days from the date of the order granting a new trial (Pet. App. 24a). Accordingly, the Act was not violated.

day, juror McSwain communicated directly with the trial judge and explained her discomfort at serving on the jury because of her relationship with the Spiegel family (8 Tr. 127-128). Another juror, Harvey Jones, informed the court that he too knew the Spiegels (8 Tr. 130-131). The court questioned both jurors individually (9 Tr. 11-13, 28-30, 34). Both said they thought they could still render an impartial verdict, but McSwain continued to express her reluctance to remain on the jury. It also became known that Jones had dated Spiegel's daughter several times (*ibid.*). After extensive discussion of the situation with all counsel, the court concluded that both jurors would have difficulty remaining impartial. The court therefore excused Jones and McSwain and replaced them with alternates (9 Tr. 10-11, 36-37).

Courts have consistently held that under Rule 24(c) of the Federal Rules of Criminal Procedure, the district court has broad discretion to replace a juror "whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." *United States* v. *Cameron*, 464 F.2d 333, 335 (3d Cir. 1972). The district court's action should not be disturbed on appeal absent a clear showing of abuse of discretion or prejudice to the defendant. *E.g.*, *United States* v. *Brown*, 571 F.2d 980, 985, 991 (6th Cir. 1978); *United States* v. *Smith*, 550 F.2d 277, 285 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Floyd*, 496 F.2d 982, 990 (2d Cir.), cert. denied, 419 U.S. 1069 (1974).

The court of appeals correctly ruled that the district court acted well within its discretion in this case (Pet. App. 11a-15a). The record demonstrates that the court carefully considered the effect of the jurors' relationship with the Spiegels on their ability to remain unbiased. McSwain was admittedly troubled about remaining on the jury, and Jones not only had a previous relationship with Spiegel's daughter but apparently had been less than candid in explaining his past acquaintance with the Spiegel family to the court. Under these circumstances, the court did not act arbitrarily in determining that these jurors could not view the case impartially.

The record contains no evidence that the replacement of Jones and McSwain had any prejudicial effect on the remaining jurors. The court questioned the two discharged jurors and found no indication that they had influenced the rest of the jury in any way (9 Tr. 15-18, 38, 48). The court also instructed the jury that no misconduct was involved in the dismissal of the two jurors and that they had acted with complete propriety (9 Tr. 49-50).

Petitioners argue that the government waived any objection to juror McSwain by failing to question her on voir dire about her knowledge of the defendants and that the court's *sua sponte* action was therefore improper.[9] This contention misconstrues Rule

[9] Jones explained that he was unaware that he knew anyone in the case until he saw petitioner Spiegel's daughter

24(c). Substitution of alternate jurors is the prerogative of the court and does not require the consent of any party. *United States* v. *Brown*, *supra*, 571 F.2d at 985; *United States* v. *Florea*, 541 F.2d 568, 573 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *United States* v. *Floyd*, *supra*, 496 F.2d at 990. *United States* v. *Goldberg*, 330 F.2d 30 (3d Cir.), cert. denied, 377 U.S. 953 (1964), on which petitioners rely, is not to the contrary. The court of appeals in *Goldberg* held that Rule 24(c) does not prevent the replacement of a juror when the reason for his disability existed at the time of his selection and went undiscovered until some time later. The court mentioned the power of both defense and prosecution to waive a challenge to a juror, but it nowhere suggested that such a waiver would prevent the court from acting on its own motion. *Id.* at 43. There is thus no conflict to resolve between *Goldberg* and the present case.[10]

5. Finally, petitioners Holloway and Perkins allege (79-1184 Pet. 8-11) that the district court impermissibly amended the indictment when it struck the words "aided and abetted" from the substantive mail fraud counts (48 Tr. 13-15). This contention is untenable.

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enter the courtroom after the start of the trial (9 Tr. 29). A government inquiry on voir dire concerning the prospective jurors' acquaintance with anyone in the case would therefore not have revealed Jones' past relationship with Spiegel.

[10] Petitioners allege a violation of their Sixth Amendment rights as well as a violation of Rule 24(c), but they cite no authority for the proposition that the substitution of jurors accomplished here amounted to constitutional error.

While the general rule is that an indictment may not be amended (*Ex parte Bain*, 121 U.S. 1 (1887)), the federal courts uniformly permit amendments when the effect is to withdraw one or more of the charges against the defendant. See *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Prior*, 546 F.2d 1254, 1257 (5th Cir. 1977); *United States* v. *Holt*, 529 F.2d 981 (4th Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), cert. denied, 423 U.S. 855 (1975). The court's action here could only have benefited petitioners, as they obviously realized when they accepted the deletion without objection (48 Tr. 14-15).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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